

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.5410 OF 2004
IN
CRIMINAL APPEAL NO.1404 OF 2004**

Anil Kumar Kawindra Rai ...Applicant
(Org.Appellant)

Vs.

S.N. Salve & Anr. ...Respondents

Shri Anil Lalla i/by M/s. Lalla & Lalla for the
Applicant.

Shri H.V. Mehta for the Respondent No.1.

Ms M. H. Mhatre, A.P.P. for the State.

**CORAM : A. S. OKA, J.
DATE : SEPTEMBER 16, 2005.**

P.C.:

1. This is an Application for bail made by the original accused No.2 in an Appeal preferred for challenging the order of conviction and sentence. The Applicant alongwith the co-accused have been convicted by the impugned Judgment and Order for contravention of Section 8(c) of the Narcotic Drugs and Psycotropic Substances Act, 1985 (hereinafter referred to as said Act of 1985) for the offence punishable under section 21 read with section 23 of the said Act of 1985. The Applicant has been sentenced to suffer on each count rigorous imprisonment for ten years each and to pay fine of Rs. One lakh each and in default in payment of fine to suffer further rigorous imprisonment for two years each. For the offence punishable under

section 29 read with section 8(c) of the said Act of 1985, Applicant and co-accused are sentenced to suffer rigorous imprisonment for ten years each and to pay a fine of Rs. One lakh each. The Applicant has been in custody from 15th January, 1998. The learned Special Judge directed that the substantive sentence shall run concurrently.

2. The learned Advocate appearing for the Applicant submitted that the learned Special Judge has committed a grave error by discarding oral testimony of some important witnesses. He submitted that the learned Special Judge committed an error by relying upon the statements recorded under section 108 of the Customs Act. He submitted that the learned Trial Judge has not put to the Applicant each and every circumstance appearing against him in evidence while recording his statement under section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the said Code). He submitted that as material circumstances were not put to the Applicant in the statement under section 313 of the said Code, entire trial has been vitiated. He submitted that out of the sentence of ten years the Applicant has suffered incarceration for almost seven years and as there is no possibility of the Appeal being heard in near

future, the Applicant is entitled to be enlarged on bail. The learned Counsel appearing for the Respondent No.2 opposed the Application by pointing out that there is a clear finding of conviction recorded by the learned Special Judge under the provisions of said Act of 1985. He submitted that this Application will have to be decided in the light of section 37 of the said Act of 1985 and therefore, no case was made out for grant of bail.

3. Before I deal with the submissions, it must be necessary to point out that on 22nd July, 2005 a submission was made by the Advocate for the Applicant that the Applicant is suffering from serious ailment and he has been also affected by H.I.V. On that day, the learned Counsel appearing for the Respondent No.1 stated before me that considering the fact that the Applicant is suffering from serious ailment and as he was hospitalised in J.J. Hospital, the Respondent No.1 had no objection if temporary bail for a limited period of two weeks was granted in favour of the Applicant. In view of the consent of the Respondent No.1, temporary bail for two weeks was granted in favour of the Applicant. On 19th August, 2005, a report was submitted by the learned Counsel appearing for the Respondent No.1 regarding health condition of

the Applicant. The report dated 17th August, 2005 submitted by the concerned Doctor in J.J. Group of Hospitals shows that on 21st July, 2005, the Applicant was admitted as he was suffering from acute appendicitis and he was discharged on 05th August, 2005. The medical opinion shows that he was advised to come for follow-up treatment in HIV O.P.D. In view of the said report, the learned Counsel appearing for the Respondent No.1 objected to the continuation of interim bail granted earlier. As prayer for bail was objected by the Public Prosecutor, the interim bail was not extended and the Application was taken up for hearing. It is an admitted position that after the period of temporary bail expired, the Applicant surrendered to bail. It must be borne in mind that section 37 of the said Act of 1985 is applicable to the present Bail Application. Therefore, the fact that the Applicant has been convicted at the conclusion of full trial cannot be ignored. On consideration of material and evidence on record, the learned Special Judge recorded a finding that the prosecution has established that the accused persons alongwith one Bhawarlal Somani from January 1997 and on 09th October, 1997 at Bombay and at other places conspired to manufacture, acquire, possess, store and sale heroine and thus abetted each other. The learned

Judge has accepted that in furtherance of the conspiracy and having any common intention of the accused for exporting out of India manufactured, stored, transported and sold 1080 grams of heroine which came to be recovered from the bottom of suitcase of Captain Zarius Dastur at the Sahara International Airport at Bombay while he was on way to London as operating pilot in the concerned flight.

4. I have been taken through the statement of the Applicant recorded under section 313 of the said Code. At this stage, it is difficult to accept the contention of the Applicant that some of the important circumstances which have appeared in evidence of the Applicant were not put to the Applicant in his statement under section 313 of the said Code. At this stage, when Appeal has not yet come up for Final Hearing, it is difficult to come to the conclusion that any material part of the evidence adduced against the Applicant has not been put to him in the statement under section 313 of the said Code. Assuming that there are certain omissions while recording the statement under section 313 of the said Code, it is at the time of Final Hearing of the Appeal it will be decided whether any prejudice has been caused to the Applicant. As of today, there is a clear finding

recorded against the Applicant about is guilt of offence under the said Act of 1985.

5. Considering the material on record and the findings recorded by the Special Judge, it is impossible to record a finding that there is no possibility of convicting the Applicant on the basis of material and evidence on record. The fact that the Applicant has undergone sentence of seven years out of ten years by itself is no ground to enlarged the Applicant on bail. In this view of the matter, there is no merit in the Application and the same deserves to be rejected. However, since the Appeal has been assigned to this Court for Final Hearing the same will appear on board on 26th October, 2005 for directions regarding fixing the date of hearing.

JUDGE